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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/412,408
Filing Date: October 05, 1999
Appellant(s): FOLEY ET AL.

Frank J. DeRosa, Reg. No. 26,543
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 09 November, 2005 appealing from the Office action mailed 23 June 2004.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,377,940	TILFORS et al.	4-2002
5,873,071	FERSTENBERG et al.	2-1999
5,243,331	MCCAUSLAND et al.	9-1993
5,924,082	SILVERMAN et al.	7-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Note: In the Final Rejection to the claims, the Examiner rejected claims 16-29 over Silverman et al. in view of McCausland et al.. However, the body of the rejection argued 16-19 and 26-29 to be rejected over Silverman et al., claims 20-23 to be rejected over Silverman et al. and McCausland et al., and claims 24 and 25 over Silverman et al. and Ferstenberg et al., *each under 35 U.S.C 103* which was the Examiner's intent. The Appellant understood this as the case and argued the references appropriately (Appeal Brief, page 6, "Issues on Appeal"). The Examiner noticed, however, that the Appellant stated that Silverman et al. was rejected under 35 U.S.C. 102. The Examiner then contacted Appellant's Representative informing him of the "error" (Interview Summary dated 1-10-06). In response, the Appellant's Representative stated that he understood that the rejection was a single-reference 103 rejection and not a 102 rejection, and that the argument directed to lack of anticipation was intentional.

The Examiner has edited the claim for clarity only. There are no new grounds of rejection.

Response to Arguments/Amendments

The Examiner has considered the Applicant's amendments and arguments. However, the prior art continues to read on the Applicant's claims.

Claim 1 has been amended to include the limitation of determining whether a better trade exists outside the system for both a party and a counterparty, and if such a trade exists executing a trade. Silverman et al. teach a system where a party enters an order (bid or offer) and the system then matches the order with a counterparty order. Tilfors et al., teach an automated exchange system where a party enters an order in a first system, the invention of Tilfors et al. then checks for a better price outside the first system, determines which trade is better (the first system or outside the first system) and executes the better trade. Hence, the combined system allows for traders to get the best price ('940, abstract). Tilfors et al. teach order books and order books comprise buy and sell orders, hence the system seeks a best price for a party whether that party is a buyer or seller ('940 abstract; column 1, lines 15-40). Therefore, to one of ordinary skill the combined Silverman et al. and Tilfors et al. system would operate to seek a better price ('940 figures 1 and 2) for both a party (buyer or seller) and a counterparty (seller or buyer) ('082, abstract) outside the initial trading system ('940 figures 1 and 2) in order to provide a fair and efficient capital market. The above analysis also applies to claim 7.

Claims 16 and 26 have been amended to include the limitation of transmitting an "IOI with respect to which an order has been entered". Silverman et al. teach IOI, or expression of interest, that comprise an order, as IOI of Silverman et al. triggers buy/sell responses from counterparties seeking to fulfill

said order (figure 2; column 4, lines 4-12). Further evidence that the IOI of Silverman et al. also serves as an order can be found in the fact that order parameters such as price, size and dates can be made "firm", and non-negotiable, while counterparty credit ranking can be negotiable (column 5, lines 1-7; column 7, lines 25-30; column 12, lines 18-36), and like the IOIs of Silverman, orders do not have to be completed (e.g. "soft" orders, cancellations). Therefore, the expression-of-interest, or IOI, (column 2, lines 27-30), as taught by Silverman et al., is both an indication of interest and an order (note: the claims as they are written do not exclude such a possibility). Claim 16 is broad, as it has not sufficiently linked the IOI and the order. Hence, claim 16 reads on a user making an order for a stock some time in the past, then placing an IOI for said stock or a related stock. Recall, Silverman et al. allow for a user to create subsets of users (figures 2 and 3; column 7, lines 14-50; column/line 9/25-10/40).

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-6 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject

matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 1 has been amended to read, "if there is no better trade in at least one stock order originating from outside the system for the particular stock for both the first party **and** the counterparty". However, this is not supported by the Specification. According to the Applicant's Disclosure, during negotiations "the system continues to consult the book of public trades in [step 86] for a match of a public trade with either side of the anonymously negotiated trade" and if there is match determines and executes the better trade (negotiated vs. book) (Specification, page 16, lines 6-22). According to newly amended claim 1, the above scenario would only take place if the other party in the negotiations also had a better trade, otherwise the system would execute the negotiated trade despite a party or counterparty having a better trade available.

Claims 2-5 are also rejected as they depend from claim 1.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. According to the Applicant's Disclosure,

during negotiations "the system continues to consult the book of public trades in [step 86] for a match of a public trade with either side of the anonymously negotiated trade" and if there is match determines and executes the better trade (negotiated vs. book) (Specification, page 16, lines 6-22). According to newly amended claim 1, however, the above scenario would only take place if the other party in the negotiations also had a better trade, otherwise the system would execute the negotiated trade despite a party or counterparty having a better trade available.

Claims 2-5 are also rejected as they depend from claim 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Silverman et al., U.S. Patent No. 5,924,082 in view of Tilfors et al., U.S. Patent No. 6,377,940.

Silverman et al. teach a distributed negotiated matching system where users can buy and sell securities over a plurality of markets (abstract; column 7, lines 1-34; column 12, lines 18-36) comprising:

- user terminals or input/output devices for conducting transactions (column 6, lines 17-26)
- parties involved in the buying and selling of financial instruments (e.g. paper, stocks, bonds, etc.) (column 3, lines 36-67)
- a database identifying users who have been involved in recent trading activity (column 4, lines 13-50; column 5, lines 1-7 and 48-60; column 7, lines 14-33)
- the matching of users based on specified trading parameters (column 4, lines 13-50; column 5, lines 48-60; column 11, lines 5-30)
- the creation of a subset of users and the presentation of data to all or only selected users (abstract, lines 6-17; column 8, lines 1-59)
- the display of bids and offers to users (column 8, lines 11-17)
- user selection of parties with whom to interact (column 8, lines 10-58)
- pop-up windows for conducting negotiations between parties (figure 6, item 600; column 12, lines 18-21)

- the electronic, anonymous negotiation of trade terms and conditions (column 3, lines 65-67; column 4, lines 1-3, 9-12 and 27-49)
- the electronic execution of trades only after both parties are satisfied with the negotiated transaction terms (column 5, lines 1-8)

Regarding "shares", Silverman et al. is directed to financial instruments (column 3, lines 50-55). Financial instruments can be stocks, bonds, currency, paper or derivatives. Therefore, although Silverman et al. provide examples through foreign exchange and interest rate swaps (column 7, lines 5-10) one of ordinary skill would know to modify the system to accommodate the buying and selling of shares. As an example, Silverman et al. disclose adapting their system to buying and selling homes (column 13, lines 30-52). Regarding the timing of when bids and offers are displayed, Silverman et al. teach a system that distributes bids and offers to the remote terminals of users of the system (column 4, lines 28-54), displays offers throughout the negotiating process (column 7, lines 42-49) and that bids and offers may be entered into the system at any time (column 7, lines 25-32). Therefore, it would have been obvious to allow a user to view bids and offers throughout the transaction process in order to obtain the best price.

However, Silverman et al. do not explicitly recite price discovery outside the initial trading system. Tilfors et al. teach a system that receives security orders in an

initial system, automatically checks the corresponding price of the security outside the system, and allows a match only if a better match cannot be found (abstract; figures 2 and 3; column/line 1/50-2/2). In addition, Tilfors et al. teach negotiations allowing a market maker to match a price from outside the system (column 2, lines 60-67) and executing trades such that priority is given to orders from the initial system (column 3, lines 25-32). Therefore, it would have been obvious to combine the teachings of Silverman et al. and Tilfors et al. in order to provide users with an improved interface for negotiating trades and receiving financial information ('940, figure 1; '082, figures 5A-7; column/line 11/35-12/36) and to reduce or eliminate the risk of a person entering an order into an automated exchange to get a worse price than he could have gotten at another exchange ('940, column 1, lines 42-46).

Claims 16-19 and 26-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Silverman et al., U.S. 5,924,082.

As per claims 16-19 and 26-29, Silverman et al. teach an electronic trading system comprising:

- user terminals or input/output devices for conducting transactions (column 6, lines 17-26)
- the matching of users based on specified trading parameters (column 4, lines 13-50; column 5, lines 48-60)

- the creation of a subset of users and the presentation of data to all or only selected users (abstract, lines 6-17., column 8, lines 1-59)
- the ability to enter indicators of interest (column 2, lines 17-30; column 3, lines 55-60)
- entering IOI with offers or bids (column 7, lines 25-30)

Silverman et al. also provide a user with the ability to establish parameters for selectively interacting with other participants, offers and bids (column 7, lines 25-31), and disclose prior art trading systems that allow users to enter expressions of interest only after entering an order (column 2, lines 17-30).

Claims 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Silverman et al., U.S. 5,924,082 in view of McCausland et al., U.S. Patent No. 5,243,331.

As per claims 20-23, Silverman et al. teach an electronic trading system comprising:

- user terminals or input/output devices for conducting transactions (column 6, lines 17-26)
- the matching of users based on specified trading parameters (column 4, lines 13-50; column 5, lines 48-60)
- the creation of a subset of users and the presentation of data to all or only selected users (abstract, lines 6-17., column 8, lines 1-59)

- the ability to enter indicators of interest (column 2, lines 17-30; column 3, lines 55-60)
- entering IOI with offers or bids (column 7, lines 25-30)

Silverman et al. also provide a user with the ability to establish parameters for selectively interacting with other participants, offers and bids (column 7, lines 25-31), and disclose prior art trading systems that allow users to enter expressions of interest only after entering an order (column 2, lines 17-30). McCausland et al. teach a dedicated keypad for a financial trading system (abstract). The keypad has special functionalities such as "bid", "confirm" "reject" "kill" commands in order to control the exchange of data between parties (figure 3., column 7, lines 38-49; column 23, lines 1-62). The keypad also allows a user to combine keys in order execute a function such as editing an order (column 23, lines 40-57). Therefore, it would have been obvious to one of ordinary skill of the art to combine the teachings of Silverman et al. and McCausland et al. in order to provide a more user-friendly interface by integrating common trading functions into the keyboard

Claims 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Silverman et al., U.S. 5,924,082 in view of Fertensberg et al. U.S. Patent No. 5,873,071

As per claims 24 and 25, Silverman et al. teach an electronic trading system comprising:

- user terminals or input/output devices for conducting transactions (column 6, lines 17-26)
- the matching of users based on specified trading parameters (column 4, lines 13-50; column 5, lines 48-60)
- the creation of a subset of users and the presentation of data to all or only selected users (abstract, lines 6-17., column 8, lines 1-59)
- the ability to enter indicators of interest (column 2, lines 17-30; column 3, lines 55-60)
- entering IOI with offers or bids (column 7, lines 25-30)

Silverman et al. also provide a user with the ability to establish parameters for selectively interacting with other participants, offers and bids (column 7, lines 25-31), and disclose prior art trading systems that allow users to enter expressions of interest only after entering an order (column 2, lines 17-30). However, Silverman et al. do not explicitly recite transmitting an IOI with an order only if that order exceeds a threshold quantity. Ferstenberg et al. teach a trading system where a participant utilizes an electronic agent for the purposes of buying and selling commodities (column/line 3/51-4/3). The "e-agent" is programmable and electronically represents a participant's trading goals (column 3, lines 21-41., column 14, lines 36-40). Using e-agents participants are allowed to make an

opening message that establishes the bounds within which a final exchange must lie- the maximum and minimum amounts of each commodity the e-agent is prepared to buy or sell (column 12, lines 62-67; column/line 13/25-14/6; column 14, lines 45-67). As in the case of Silverman et al. ('082, abstract), Ferstenberg et al. disclose an intermediary for matching buyers and sellers (figure 1). In the Ferstenberg et al. teaching the intermediary exchanges e-agent openings, offers and counteroffers that are determined by e-agent constraints such as a maximum amount exchanged (i.e. threshold quantity) (column 15, lines 1-61 ; column/lines 18/6-19/54). Therefore, it would have been obvious to one of ordinary skill to program the e-agent to implement a desired trading strategy, such as "all or none" (column 19, lines 19-31) or other strategies that are based on a specified quantity, as e-agents are programmed, using rule interpreters and procedural rules, to evaluate offers, and can be tailored to meet a participant's objectives (column 14, lines 45-67). Therefore, it would have been obvious to one of ordinary skill to combine the teachings of Silverman et al. and Fertensberg et al. in order to maximize the aggregate number of units of commodities exchanged in a fair manner that is acceptable to the participants ('071, column 3, lines 42-50; column 18, lines 5-67).

(10) Response to Argument

112 first paragraph

According to Appellant's Specification, "the system continues to consult the book of public trades in [step 86] for a match of a public trade with either side of the anonymously negotiated trade" and if there is a match determines and executes the better trade (negotiated vs. book) (Specification, page 16, lines 6-22). The Specification, also states, "... and whether there is a better trade in the particular stock for either the first party or the counterparty is determined" and not executing a trade "if there is a better trade with a third party" (Specification, page/line 3/17-4/3; Appeal Brief, page 7, first full paragraph). Claim 1 has been amended to recite, "if there is *no* better trade in at least one stock order originating from outside the system for the particular stock for *neither* the first *nor* the counterparty" (emphasis added). However, this is a "double negative" (compare with the statement "if there is a better trade for neither the first nor the counterparty") and according to the limitation as it is now written, the system would execute a trade between party and counterparty even when there is a better trade for both outside the system. A clear contradiction of Appellant's Specification and thus not supported.

112 second paragraph

Claim 1 describes executing a trade between a party and counterparty, “if there is no better trade in at least one stock order originating from outside the system for the particular stock for *neither* the first nor the counterparty”. Appellant intends for the above to read on “executing of the negotiated trade... only if there is not a better a trade for *either* side of the negotiated trade” (Appeal Brief, page 8, second full paragraph). However, “neither” is not the same as “either”, therefore it is unclear to one of ordinary skill, and in light of the clear teachings of the Specification, how Appellant’s method operates if a better trade doesn’t exist (Specification, page/line 3/17-4/3; page 16, lines 6-22).

103 rejection

Claims 1-6 and 9-15

Silverman et al. teach a system for anonymously executing trades between a first party and a counterparty ('082, abstract; column 4, lines 9-12). Silverman et al. teach a first party constructing an offer to buy or sell shares by selecting a number of shares and a price for said shares ('082, figure 5A; column 11, lines 39-58) and selecting one or more counterparties for receiving said offer ('082, figure 3; column 9, lines 25-58). Silverman et al. also teach the first party and counterparty negotiating the terms of trade ('082, column 7, lines 12-65) such as quantity (column 7, lines 25-30). Therefore, Silverman et al. teach the first party and a counterparty agreeing to trade up to an agreed number of shares as the outcome of the negotiation may be to increase the

quantity (i.e. trading up to an agreed number of shares). Regarding “shares”, Silverman et al. are directed to buying and selling financial instruments (column 3, lines 50-55). To one of ordinary skill, commercial paper, stocks, bonds, and options are all financial instruments (‘082, column 3, lines 36-67) hence the interface (‘082, figure 5A; column 11, lines 39-58) could be used equities (i.e. shares) or bonds. Silverman et al. also teach an alternative embodiment where the first party and counterparty transaction “is not held” that allows for a third party to negotiate a better deal with either the first or counterparty (‘082, column 7, lines 42-50), therefore, Silverman et al. teaches or at least clearly suggests to one of ordinary skill, executing a trade between the first party and the counterparty “if there is no better trade in at least one stock” for either the party. Silverman et al., on the other hand, do not explicitly recite seeking a better trade *outside the system*. Tilfors et al., teach an automated exchange system where a party enters an order in a first system, the system (‘940, abstract; figures 1-4; column/line 1/50-2/2) checks for a better price outside the first system, determines which trade is better (the first system or outside the first system) and executes the better trade. Therefore, to one of ordinary skill the combined systems of Silverman et al. and Tilfors et al. teach claim 1. In Appellant’s opinion, however, this is not so because Tilfors et al. are only limited to buy or sell orders and not both (Appeal Brief, page 10, “Tilfors et al.”; page 11, “the combination of Silverman et al. and Tilfors et al....”) and do not teach negotiation (Appeal Brief, page 11, first full paragraph). However, the Examiner relied on Silverman et al. to teach “trading up” (through negotiations- ‘082, abstract) between a first party

and a counterparty, and while, Tilfors et al. might not explicitly recite “negotiations” it at least suggests “trading up” (‘940, column/line 2/60-3/18) which is what is called for by the claim. Similarly, whether or not Tilfors et al. teach seeking a better trade for both parties is immaterial as the Examiner relied on Silverman et al. to teach two parties negotiating a trade, and the question becomes would one of ordinary skill modify Silverman et al. to seek a better trade beyond the system as Silverman et al. clearly teach the process within the system (‘082, column 7, lines 42-50). Appellant’s line of reasoning, however, only narrowly considers what Tilfors et al. individually teaches and not what the combination of references would have suggested to one of ordinary skill.

More specifically, it has been held

(In re Keller, Terry, and Davies, 208 USPQ 871 (CCPA 1981) that

...the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.

Silverman et al. teach “trading up” between a first party and a counter-party (‘082, abstract). Silverman et al. also disclose executing a trade between the first party and the counterparty “if there is no better trade in at least one stock” for either the party. (‘082, column 7, lines 43-50). So again the question is asked, would one of ordinary skill sought better pricing elsewhere? To one of ordinary skill, Tilfors et al. provide a clear and convincing answer:

However, in today's exchanges it has become more and more common that the same **financial instrument** [trades] at different exchanges at the same time. Furthermore, the price for the same financial instrument is not always the same at these different exchanges. **However, investors are not interested in having to care about this. The investors want the best price available and demand that the exchange preferably should guarantee that it provides the best price if there is a deal.** This has created a problem for investors, which have to choose the exchange at which they believe that they can obtain the best price at a particular moment (emphasis added) ('940, column 1, lines 29-40).

Therefore, according to Tilfors et al. investors, both buyers and sellers (i.e. party and counterparty, or vice versa), in the Silverman et al. system would want to know if a better price exists beyond the initial network of users. In response, Tilfors et al. provides a solution (Appellant's solution to a "particular cure"- Appeal Brief, page 13, lines 8 and 9) by comparing orders against other exchanges ('940, column 2, lines 47-52) thereby reducing or eliminating the risk for an investor getting a worse price (Appellant's "particular cure"- Appeal Brief, page 13, lines 8 and 9) than what is available elsewhere ('940, column 1, lines 42-48).

Claims 7 and 8

Appellant is of the opinion that claim 7 is distinguished from the prior art because Appellant's system executes a trade between (1) two orders originating within the system and (2) between an order originating from within the system and an order from without the system according to a "priority" where a priority can be a better trade (Appeal Brief, page 14, lines 10-12). However, the Examiner respectfully disagrees as

Silverman et al. teach matching two user within a system ('082, abstract), while Tilfors et al. teach matching a user with a better trade outside the system and executing the better trade ('940, figures 1-4). Hence, the combined prior art teaches trade execution according to the priority of claim 7.

Claims 16-19 and 26-29, claims 20-23 and claims 24-25

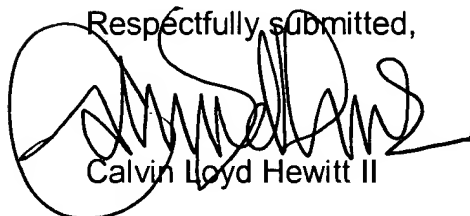
Regarding claims 16-29, the Appellant has only argued the features of claim 16, therefore, the Examiner directs the response to this claim.

Initially, in the Final Rejection to the claims, the Examiner rejected claims 16-29 over Silverman et al. in view of McCausland et al.. However, the body of the rejection argued 16-19 and 26-29 to be rejected over Silverman et al., claims 20-23 to be rejected over Silverman et al. and McCausland et al., and claims 24 and 25 over Silverman et al. and Ferstenberg et al., *each under 35 U.S.C 103* which was the Examiner's intent. The Appellant understood this as the case and argued the references appropriately (Appeal Brief, page 6, "Issues on Appeal"). The Examiner noticed, however, that the Appellant stated that Silverman et al. was rejected under 35 U.S.C. 102. The Examiner then contacted Appellant's Representative informing him of the "error" (Interview Summary dated 1-10-06). In response, the Appellant's Representative stated that he understood that the rejection was a single-reference 103 rejection and not a 102 rejection, and that the argument directed to lack of anticipation was intentional.

Appellant is of the opinion that the prior art of Silverman et al. does not teach "automatically executing a trade". Specifically, Appellant asserts that because Silverman et al. require negotiation, automatic execution of a trade is absent from Silverman et al. and, therefore, cannot be applied to claim 16 (Appeal Brief, page 17, lines 6-12). The Examiner respectfully disagrees. Silverman et al. teach parties to a transaction, after negotiations, sending signals to a remote matching computer for executing the transaction and removing a corresponding offer and bid from the system ('082, figures 1 and 2; column 6, lines 27-38; column 7, lines 54-64). Therefore, to one of ordinary skill, as the trade is executed by computer ('082, figure 1; column 6, lines 27-38; column 7, lines 54-64) it is necessarily executed automatically.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

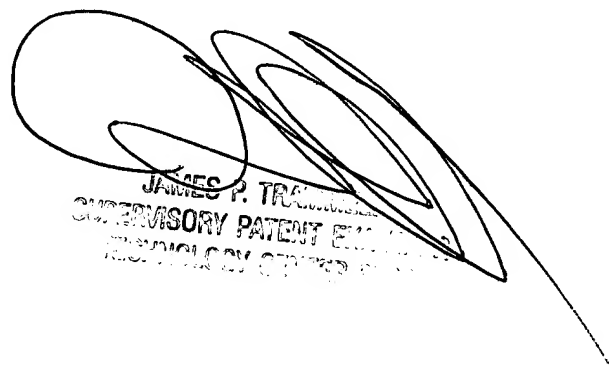


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